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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 776

OCTOBER TERM, 1961.

LAWRENCE J. LONG,
Petitioner,

v.

ILLINOIS CENTRAL RAILROAD COMPANY,
a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Appellate Court of Illinois.

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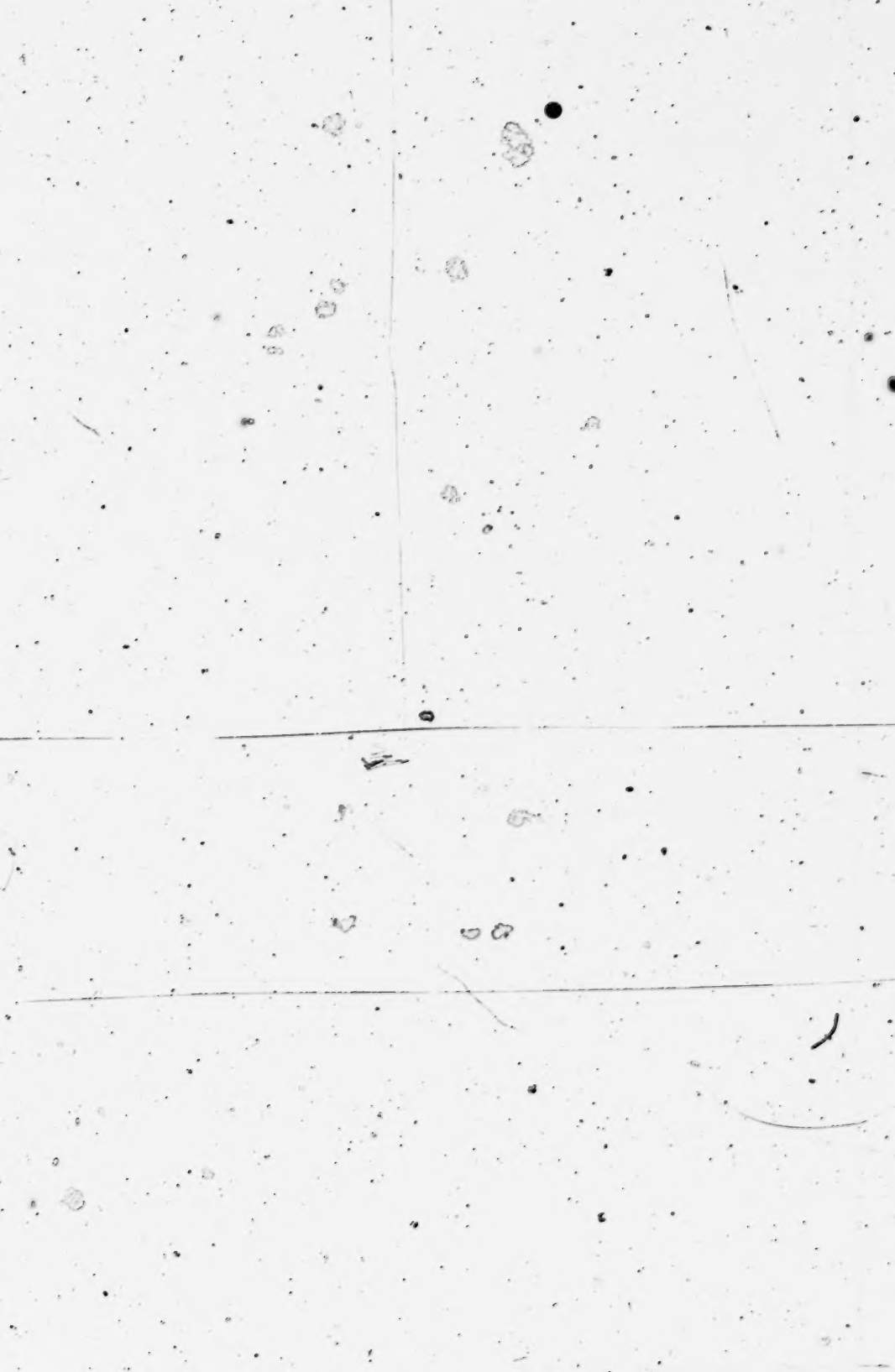

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To the Appellate Court of Illinois.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, Third District, reported in 32 Ill. App. 2d 103; 176 N. E. 2d 812.

BASIS OF JURISDICTION

The Appellate Court judgment was entered September 6, 1961. Leave to appeal to the Illinois Supreme Court was sought, but denied January 22, 1962. Both the Appellate Court opinion and Supreme Court judgment appear in the Appendix.

Jurisdiction is invoked under Title 28, *United States Code*, §1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Can a railroad employer, without complying with the requirements of 45 U. S. C. A. § 152, 156 change the medical examination requirements so as to substitute a wholly new type of color-vision test and disqualify an employee from continued employment on the basis of the new test?

2. When the railroad employer insists that the employee would have been disqualified under the old tests, is not a jury question presented as to credibility of its only medical witness where it is not disputed that the condition in question is congenital and unchanging from birth, that the employee passed satisfactorily ten former tests of that type, and his work showed a perfect record and not one missed signal in thirty years? Otherwise stated, was it not error to enter summary judgment for the defendant on the basis of that doctor's affidavit when countered by affidavits disclosing the results of other examinations and perfect work performance?

3. If such employee was disqualified under an illegal medical test, he is not required to take a field test as a condition precedent to continued employment. But, even if he were so required, may the railroad require a "field test" in which a 100% passing grade is required, in which the only persons present are its own officials and employees, and which tests it uniformly waived as to all employees other than the plaintiff? Is not, in other words, an arbitrary test so spottily applied a deprivation of property without due process of law?

4. Where the disqualification is, for all practical purposes, a discharge, does not the employee, under the *Moore* case have a right to sue in a state court instead of proceeding before the Railroad Adjustment Board? Indeed, would not the seeking of the latter remedy bar him from a suit at common law for wrongful discharge?

CONSTITUTIONAL AND STATUTORY QUESTIONS

In addition to the Fourteenth Amendment, the pertinent statute involved is the *Railway Labor Act*, with particular reference to 45 U. S. C. § 152 (7th), 156. These are set forth in the Appendix to save space.

STATEMENT OF THE CASE

Plaintiff sued defendant railroad in the Circuit Court of Champaign County, Illinois, for damages for wrongful discharge and demanded a jury trial. He alleged that he had worked for defendant for more than twenty-five years as fireman and engineer, that he had a slight congenital defect in color perception which had never interfered with the performance of his duties, that he passed every medical examination given to him under Circular No. 18 prescribing use of the "Holmgren Worsteds" (an identification of colored yarns test). He alleged that defendant in April, 1954, arbitrarily substituted a different type of test, disqualified him from service on the basis thereof, and insisted that he take an arbitrary and unfair "field test" which it did not require of other employees disqualified for color defects. He alleged that the action of defendant was motivated by malice because of a ruling made by plaintiff as an I. C. C. employee on a leave of absence, and refused to take the field test.

Defendant filed a motion for summary judgment, to which it attached affidavits including discovery depositions taken from plaintiff and defendant's officers. The plaintiff filed objections supported by affidavits, including admissions contained in these same depositions.

Dr. Murray, whose affidavit was used to support plaintiff's disqualification, stated in it that in his 1954 examination of plaintiff the latter had flunked both the Ishihara

(color dot) test and the Holmgren Worsteds test. However, it is not disputed that color defects are congenital in nature, which neither improve nor get worse as one proceeds through life (Abst. 68). Dr. Murray further testified in his deposition that the company records showed that the plaintiff had passed satisfactorily ten successive Holmgren Worsteds tests over the thirty-one year period from 1922 to 1953 with never a failure (Abst. 71-76).

Mr. Hallmann, personnel superintendent of the railroad, testified in his deposition that he had personally and on his own authority changed the tests in 1954 (Abst. 84), even though the Holmgren Worsteds tests were the only type ever used in the past (Abst. 46, 76) and even though Operating Circular 18 remained unchanged. Hallmann admitted writing a letter in 1956 that he was certain Long could perform the work (Abst. 67). He testified that Long had a perfect record, with no demerits, with no complaints ever made of any missed signal (Abst. 60-62), and that Long had received a commendation in 1953 for the acuity of his vision in spotting a broken rail, which averted a possible serious accident (Abst. 62). Hallmann further testified that there were other firemen, engineers, brakemen, and switchmen who had been disqualified by medical examinations for color defects or partial blindness who were put back to work without taking a field test (Abst. 92). Such was waived in their cases irrespective of prior demerits (Long had none), one having as many as 270 demerits (Abst. 62-64, 92-100, 102-108).

Wayne Johnston, Jr., in his deposition, confirmed the fact that plaintiff had a perfect work record, that he had received the commendation in 1953, that the requirement of a field test had been waived as to other employees performing like work with similar medical disqualifications, and that defendant had refused to waive in the instance of plaintiff (Abst. 62, 96-100).

The defendant's officials admitted that the field test requirement imposed upon plaintiff the requirement of 100% accuracy, that the grade was determined by two of the railroad officials, that plaintiff could not have an independent expert nor his own counsel present but simply another employee who would have no voice in grading (Abst. 80-82).

Plaintiff in his affidavit (Abst. 56-59) testified that his color perception was the same as when he first started to work for the defendant, that he had no difficulty in recognizing the primary colors; that while with the Interstate Commerce Commission, on a leave of absence, he had cited defendant railroad for a violation and had been told by its representatives that they would see that he encountered trouble; that two officials of defendant railroad had discussed means of getting rid of plaintiff, and that his discharge was actuated by malice.

Before securing counsel, plaintiff, on advice of the defendant railroad, applied for and received a pension from the Retirement Board for disability, which, he stated, would be repaid from this recovery (Abst. 58, 59).

FEDERAL QUESTIONS PRESENTED.

The complaint in the trial court set up a wrongful discharge. The defense relied upon the Railway Labor Act in an effort to defeat the judicial remedy (Abst. 119). Plaintiff's objections to defense motion for summary judgment set up the deprivation of property without due process of law (Abst. 56), and the Notice of Appeal preserved this ground under the Fourteenth Amendment (Abst. 136). The trial court, upon February 23, 1960, entered summary judgment for the defense, without opinion. The Illinois Supreme Court, to which a direct appeal was taken April 18, 1960, because of the constitutional questions involved, on October

4, 1960, transferred the cause over plaintiff's objections to the Appellate Court, Third District. (Abst. 131), again without opinion; then on January 22, 1962, denied leave to appeal from the Appellate Court opinion contained in the Appendix. That opinion does not discuss the constitutional questions, but held, in effect, that the Railway Labor Act precluded the judicial remedy.

REASONS FOR THE ALLOWANCE OF THE WRIT AND ARGUMENT.

There is an area of complete confusion which now exists concerning the common law rights of railroad employees. Our understanding from *Moore v. Illinois Central Railroad Company*, 312 U. S. 630 at 634, 636 is that the employee has an alternative remedy—either to sue at common law or to apply to the Adjustment Board. This seems to have been confirmed in *Brotherhood of Railroad Trainmen v. Howard*, 343 U. S. 768.

The refusal to permit an employee to work is, for all practical purposes, a discharge—the failure to use the word "discharge" not changing the practical effect of the employer's act. *Del Buono v. Pennsylvania Labor Relations Board*, 370 Pa. 645, 89 A. 2d 323 at 326; *Schlueter v. School District No. 42 of Madison County*, 168 Neb. 443, 96 N. W. 2d 203; *Jameson v. Board of Education*, 78 W. Va. 612, 89 S. E. 255; *O'Brien v. Straight Filament Lamp Company*, 86 N. J. L. 352, 91 A. 100 at 101; *Burden v. Woodside Cotton Mills*, 104 S. C. 435, 89 S. E. 474 at 475. This Court reached an essentially similar result in the *Howard* case, to which reference is made above. In that situation, the railroad did not discharge the colored porters; it simply would not permit them to work.

There are several patent errors in the legal doctrines enunciated by the Illinois court which, intermixed with

its factual errors, cause considerable confusion. Let us straighten these out first, since they are conclusive against us if that court is correct and if we are in error.

The Appellate Court, in discussing the *Handley* case, states (32 Ill. App. 2d 103 at 110):

> "* * * the matter must be handled by negotiations and ultimately, in the process of adjustment, by the National Railway Adjustment Board * * *."

It goes on to adopt like reasoning for its own conclusion. Thus it states (p. 111):

> "* * * it is clear that the plaintiff, must be barred from pursuing his remedy in any court until he has exhausted his remedy under the remedies supplied by the Railway Labor Act * * *."

In other words, under the Illinois decision, proceeding before the Railroad Adjustment Board is held a condition precedent to suit in court. Under the *Moore* and *Howard* cases, where a wrongful discharge is involved, it is our interpretation of the law that these are alternative remedies. In fact, as this Court pointed out in *Union Pacific Railroad Company v. Price*, 360 U. S. 601, if we did proceed before the Adjustment Board, such would be a conclusive election of a remedy. Thus, if we proceeded before the Board and won, we would need no judicial remedy; if we proceeded before the Board and lost, we would have elected the administrative remedy in lieu of the judicial remedy.

In fact, if the Illinois courts were correct that the controversy would lie only before the Railroad Adjustment Board, there would be a complete lack of jurisdiction in the Illinois courts. All they could do would be to dismiss the suit without prejudice. Certainly summary judgment

for the defendant on the merits of the case could not be granted where jurisdiction would be lacking.

The Illinois decision also infers that the employee must exhaust his remedies within the organization, as provided by the labor contract. May we point out that there is no appeal procedure set forth in either the engineer's or firemen's contracts? Both of these set forth the procedure upon pages 37, 38 of the Abstract but provide no appeal mechanism—unless it be by reference to the field test, which we will discuss fully later. Under Illinois law (Ch. 110, § 101.13 (3)), the burden is on the defense to allege any failure to perform any condition precedent. The defense pleaded no appeal procedure, unless it be the field test, upon which it relies—and set forth no failure to fulfill any condition relating to administrative remedies.

Before going to the field tests, and the acts which we contend constituted a denial of due process, let us correct a few of the misstatements appearing in the Illinois court's opinion which otherwise could cause confusion:

> 1. (32 Ill. App. 2d 103 at 107): "* * * it would seem that both the unions representing the engineers and firemen, and the railroad recognize the importance of good color perception * * *"

We do not quarrel with this. But the defendant does not contend that the plaintiff did not have adequate color perception. Railroad signals deal only with primary colors (Abst. 47, 65, 66) as involved in the colored yarn tests, not the pastel shades of the Ishihara test. The defendant's officers admitted that one who could recognize those primary colors would be a safe employee (Abst. 66), that they knew Long could do so (Abst. 67), and that Long had never missed a signal in thirty-one years of service (Abst. 60).

And, in all events, when the contract existing between the union and the railroad prescribed a certain procedure of color testing under which the plaintiff had been accepted for employment, and which method of testing was followed uniformly for the next thirty-one years using the colored yarns test, the railroad had no power in violation of *U. S. C.*, Title 45, §§ 152, 156—by its unilateral action to change the tests without the notices and hearings provided by statute. It is admitted that compliance with this statute was not made (Abst. 84), Hallmann stating: "I authorized the change."

> 2. (32 Ill. App. 2d 103 at 107): "If plaintiff had been given only the Holmgren Yarns test he still would have failed."

This is the danger arising when courts forget the importance of jury trial and grant a summary judgment upon the basis of a single affidavit filed by a biased witness. Such would place all employees at the mercy of their employers and of the latters' paid examiners.

This remained a factual issue for jury determination. The jury was not bound to believe the defendant's medical examiner to the effect that Long had failed the Holmgren Worsteds test, first, because of the interest and bias of such witness; second, it was undisputed that such a color defect is congenital and does not vary throughout life—yet plaintiff had, as Dr. Murray admitted and defendant's medical records showed—passed satisfactorily all ten Holmgren Worsteds tests given to plaintiff over his thirty-one year span of employment by defendant. These facts appeared not only by counteraffidavits but by the very depositions attached in support of the defense motion for summary judgment. Therefore, the above was a conclusion of fact for a jury to determine—not for a reviewing court to decide.

3. The Illinois Court then stated (32 Ill. App. 2d 103 at 108):

> "* * * by the tests given him, plaintiff failed and was disqualified for service because of a color perception defect * * *."

Our answer to this is, simply:

A. The expression "by the tests given him" requires that the tests be legal tests. Under the statute, the carrier had no right unilaterally to change the procedures followed for over three decades without giving the statutory notice and holding hearings relative to changing from the Holmgren Worsteds to the Ishihara or "color dot" test.

B. If only the Holmgren Worsteds tests were proper, under the circumstances, then it was for the jury to determine whether Dr. Murray was being truthful in saying that Long failed the Holmgren test which Murray gave, when the visual condition is congenital, never varying, and with Long having passed every such test given for thirty-one years and with Long never having missed a signal in all that period of service. Credibility is fundamentally for the trier-of-fact, and not to be resolved by the affidavit of a biased employee.

4. Finally, the Illinois Court says, in effect, that the "field test" is an administrative requirement which the employee must fulfill before he can seek his judicial remedy (32 Ill. App. 2d 103 at 106, 107, 109). With this, we disagree for the following reasons:

A. If the Ishihara or pastel dot test was not a legal test, Long could not be disqualified by it.

B. If the basis for discharge was malicious, rather than for physical reasons, and this was tacitly ad

mitted by failing to join issue, Long could not be compelled to take a field test.

C. If the field test was manifestly capricious and arbitrary, it could not be used as a valid condition of continued employment.

D. If the employer waived the field test in the case of all employees other than Long having similar or worse visual defects (and this is undisputed), it cannot apply the test to him alone in order to deny him employment.

Let us discuss these matters at greater length, since they require a more specific analysis of the transcript. As we have stated, it is our contention that if the plaintiff was improperly disqualified, he could not be compelled to take a field test, whether it be reasonable or arbitrary. For thirty-one years, only the Holmgren Worsteds test had been used to test the color perception of all employees. The Railway Labor Act, 45 U. S. C. § 152 (7th) states:

"No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

Section 156 provides that no carrier may change any agreement affecting rules or working conditions without giving at least thirty days' written notice of such intended change and a time and place for a conference between representatives of the parties interested in such intended changes.

Defendant did not contend in any of its pleadings, affidavits, or exhibits that it complied with such statutory requirements. Instead, it admitted that such was a purely unilateral action on its part. Its personnel supervisor, Hallmann, testified: "I authorized the change" (Abst. 84).

If, then, the change to an Ishihara test, on the basis of which plaintiff was disqualified, was illegal, plaintiff could not be required to take a field test in order to prevent his discharge. He would have a right to refuse to take such field test, which he did.

Even if the plaintiff had been disqualified in a proper manner, we submit that the field test requirement here was illegal for two reasons: (1) Its requirements were so manifestly unfair and arbitrary as to place the employees wholly at the defendant's mercy; (2) The defendant had waived the field test requirement in the instance of all other employees with like physical conditions but with far less imposing work records. It had no right to insist upon the requirement as to Lawrence Long in order to effect a malicious discharge (and the facts in plaintiff's affidavit in this regard were not disputed in any way by the defendant).

Circular 18 (Abst. 36) provides as to such field test, in part:

"10. Should the examination disclose a defective color perception, vision or hearing such as might make necessary the employe's withdrawal from the service engaged in, the Chief Surgeon will so notify the superintendent, and he, in turn, will notify the employe. If not satisfied with the examination the employe may appeal to the superintendent, in writing, for a field test. Such a test to be held within five (5) days after receipt by the superintendent of the appeal. The field test will be final, and the employe disqualified will not be given a second field test. The employe concerned will be advised result of the field test without unnecessary delay, and 100% perfect is necessary to satisfactorily pass a field test.

"12. Field tests will be conducted under the supervision and direction of the superintendent or his repre-

sentative, and the Company Surgeon or his representative.

"13. Any person in *service of the company* selected by the employee to be examined may be present at the field test." (Italics supplied.)

Hallmann testified in his deposition as to the field test (Abst. 80-82):

Q. Is it not true that one of the representatives who conducts the tests is either the superintendent or his representative? Is that correct, sir?

A. That is correct.

Q. Isn't such a person an employee of the Illinois Central Railroad Company?

A. That is correct.

Q. Isn't another person who conducts the field test the company surgeon or his representative?

A. That is correct.

Q. And isn't that person paid by the defendant Illinois Central Railroad Company?

A. That is correct.

Q. And the person whom the employee is entitled to bring along must be a railroad employee?

A. Oh, yes.

Q. He could not be, under the rule at least, an independent physician or ophthalmologist, is that correct?

A. That is correct.

Q. Or, under the rule, he would not be his attorney?

A. Unless he was a company attorney. We have them, too. * * *

Yet the transcript shows without dispute that a field test was waived in the case of all other employees with color or visual defects. For example, Engineer W. C. Ralls (Abst. 88) was disqualified from service by reason of the fact that he was blind in his right eye. Upon April

14, 1958, the traveling engineer recommended that an exception be made to permit this man to continue in service as a fireman, and such recommendation was adopted by the superintendent upon May 5, 1958. Upon May 22, 1958, the traveling engineer stated that he had never removed him from the job, and upon June 2, it was asked by the superintendent whether Mr. Ralls was still operating a locomotive in main line service though blind in his right eye. Upon June 3, 1958, the chief surgeon stated that the employee had been re-examined and was found still disqualified. On June 10, 1958, the superintendent recommended that he be permitted to continue work as a fireman, and on June 16, 1958, this was authorized by the general manager. No field test was required (Abst. 88, 92, 94 96, 98).

John English, Jr., on January 18 was disqualified from service because of defective color perception (Abst. 88). On March 18, 1954, the assistant superintendent requested that an exception be made to permit him to continue in service, which recommendation was echoed upon March 23, 1954, by the superintendent. On March 31, 1954, the general manager made such an exception. Even though, upon March 17, 1958, upon medical re-examination, he was found still disqualified, no field test was required (Abst. 88, 89, 92, 98, 106, 107).

Fireman Francis Stokowski (Abst. 87) is shown by his personnel record to have been disqualified upon February 2, 1954, because of defective color perception. Again, he was permitted to return to service although he failed to pass a pseudo-isochromatic test upon re-examination. No field test was required (Abst. 87, 92, 98).

Noble G. Williams (Abst. 90, 92, 96, 98) was found to have defective color perception and disqualified. He was re-examined and again disqualified. Nevertheless, he was

retained in service with no field test having been given or passed.

Engineer E. B. Ricks was disqualified upon February 6, 1951, for defective color perception. Upon re-examination he still could not pass the pseudo-isochromatic test. No field test was given and he was retained in service (Abst. 87, 92, 93, 98, 99, 102, 104, 105).

Here is Engineer Ricks' record (Abst. 62-64):

"10 demerits—Suspended, failure to report for duty.
20 demerits—Concern in derailment at Centralia.
30 demerits—Concern in collision at Decatur in which passenger train collided with yard engine.
10 demerits—Carelessness displayed in backing into train.
50 demerits—(Apparently violation of Rule G-800, 803 and 805).
30 demerits—Concern in Peoria District Accident No. 2.
30 demerits—Concern in Clinton District Accident No. 8.
5 demerits—Running regular stop on Train No. 135.
15 demerits—Violation Rule 509—A Stop 'Block at Stop'.
30 demerits—Failure to observe stop and proceed signal displaying Stop indication, passing at excessive speed.
10 demerits—Failure to restrict speed in accordance with 15 upon explosion of torpedoes.
15 demerits—Concern Clinton District Accident No. 3—violation of 1st and 2nd paragraph of Gen. Notice and Rules 34 and 700.
15 demerits—Violation Trans. Rules 104-989—Running through North Cross-over, Switch engine 2136 train 172 between Leafland and Grand Avenue (Decatur).

(no demerits)—Violation first four paragraphs of General Notice in Trans. Rule Book—3rd and 4th paragraphs of Rule 104, Rules 106, 700 and 989 in connection with derailment of yd. engine 1725 on Old Pass between Marietta & Condit Streets, Decatur."

Compare this to the record of Engineer Lawrence Long. Hallmann stated (Abst. 60):

Q. Are there any demerits shown in that personnel file of Lawrence Long?

A. No, Mr. Long has what we call a perfect record, a perfect record being a record in which there are no demerit marks.

In fact, just four months before the change in color perception tests, Lawrence Long received the following commendation upon September 28, 1953, from Wayne A. Johnston, Jr., (Abst. 61, 62):

"Dear Mr. Long:

"I understand that you found and reported a broken rail in No. 10 track, 'A' yard, Clinton, on September 15 and that examination showed approximately 14 inches of the ball of rail gone and rail broken in the web and base.

"I want to thank you for your alertness and prompt action in reporting this broken rail as no doubt a serious accident was avoided. A suitable notation will be placed on your record."

The Appellate Court then made this erroneous statement (32 Ill. App. 2d 103 at 107) as to the above employees:

"Apparently the railroad company officials and surgeons believed these men could continue to work and upon re-examination • • • they were permitted to work."

Upon re-examination, these men were not medically cleared. Dr. Murray testified that, upon re-examination, each of the above employees was found still to be disqualified (Abst. 87); that each of the employees resubmitted (including Williams and Stokowski) to pseudoisochromatic color tests failed such tests (Abst. 90, 91, 106, 108); that Ricks and Ralls remained medically disqualified on re-examination (Abst. 94, 95); and nothing in the defendant's medical files shows that the medical department was consulted upon the defendant's decision to retain these men in service (Abst. 89) despite their physical and medical disqualifications. Accordingly, the above statement of the Illinois court is not substantiated by the record, but the decision to permit these men to remain in service was an arbitrary one, made by management, without requiring them to submit to field tests.

A man's right to work is as much his property as his house, his automobile, or his bank account. We do not believe an employer has a right suddenly to discharge him, nor to refuse him the right to work, after thirty-one years of service by changing unilaterally the conditions of his employment, by imposing unfair and arbitrary tests over which it alone can exercise control, or by requiring such tests of one man, which tests it waives as to its other employees. The law does not contemplate such an inconsistent and unfair administration of his working rights because of the honorable discharge of his duties while attached to a federal regulatory commission. If such coercion could be utilized by the railroads, few violations would be reported by employees required to return to their railroad employment after detached duty has ended.

SUMMARY.

It is, therefore, respectfully submitted that a writ of certiorari issue to review the judgments and orders of the Appellate Court of Illinois as confirmed by the Supreme Court of that State, by denial of the petition for leave to appeal.

Respectfully submitted,

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APPENDIX.

OPINION OF APPELLATE COURT.

Reynolds, J.

Plaintiff claims wrongful discharge. Defendant contends plaintiff was not discharged, still holds seniority as a fireman and locomotive engineer, but is disqualified for service because of a defect in color perception. Plaintiff had worked for the defendant railroad company for about 25 years and from time to time had passed physical examinations as required by the company. In February 1954, he was given a test for color perception and failed to pass. He was re-examined in April 1954 and again failed to pass. On May 7, 1954, the railroad company notified plaintiff he was disqualified for further service as a fireman or locomotive engineer. The plaintiff took the matter up with his union, the Brotherhood of Locomotive Engineers and was advised by officials of the union he should take a field test. Plaintiff failed or refused to take the field test, but wrote a letter to the superintendent of the railroad company at Clinton, Illinois, admitting the defect in color perception but claiming it was minor and he could properly perform the duties of a fireman. This request was refused by the company. Whether before or after, the time not being clear, the plaintiff then applied for and began receiving his railroad retirement pay. Some time in 1958, plaintiff brought the present suit.

No testimony was taken and the issues are presented by the pleadings, affidavits and exhibits. While there are many side issues, it would seem the vital issues in this cause can be reduced to these questions. 1. Was there a wrongful discharge? 2. Assuming there was a wrongful discharge, is the plaintiff compelled to exhaust his administrative remedies before bringing suit? Determination of

those questions will dispose of the many collateral and side issues of the cause.

The first question of wrongful discharge must depend upon the questions of discrimination, the method of examination, the failure of the plaintiff to take the field test, his election to take his retirement, and the fairness of the field test. In considering these questions, it must be recognized that an employer, even though under the Railway Labor Act, owes no duty to an employee to keep him employed, except by contract. There is no common law right of the employee to employment by the railroad, but a contractual right, established by the contract between the railroad and the unions, and the employee has no right of action, except for a breach of that contract. Here both the employee and the railroad were bound by the terms of that contract. Article 39 of the Firemen contract provides for the handling of grievances. The procedure is outlined in detail. Article 50 of the Engineer contract outlines the procedure for hearing of charges against an engineer. There is nothing in the record to show that any of the provisions of either of these articles were used by either the employer or the employee. The railroad contends that the plaintiff was disqualified for service because of his color perception defect, that he has not been discharged, and that he still retains his seniority rights. This distinction is important here, since there were no charges preferred against plaintiff at any time, there was no hearing or request for hearing, and no reported grievance to be adjudicated. Plaintiff, in his letter to the superintendent of the railroad company, at Clinton, Illinois, under date of August 9, 1954, apparently recognized that his remedy was by way of his union, and by appeal from the order of the railroad disqualifying him for service as a fireman or engineer. However, he did not appeal. He bases his refusal to take the field test upon the ground that such a test is unfair. This field test is provided for in

Circular No. 18 of the railroad company adopted January 1, 1928, and in force in 1954, which provides that should the examination of the employee disclose a defective color perception, making necessary the employee's withdrawal from the service engaged in, the employee should be notified. If not satisfied with the examination the employee may appeal to the superintendent in writing, for a field test. 100% perfect is necessary to satisfactorily pass a field test. The field tests are to be conducted by the superintendent or his representative, the company surgeon or his representative, and at the field test any person in service of the company selected by the employee may be present. This rule of the company as to field tests has been in effect for many years and while requiring a rigid 100% grade, this fact alone of that the person selected by the employee must be an employee of the company, does not, make the test unfair. The rule itself may be too rigid, or require too much, but it has apparently been recognized and accepted by the unions, for a long time. Since the correct reading of color signals is highly important to anyone connected with railways, it would seem that both the unions representing the engineers and firymen, and the railroad recognize the importance of good color perception and the employer has the right to insist upon its employees possessing good or near perfect color perception.

Plaintiff contends that he had passed many times, the Holmgren Worsted test which is by colored skeins of yarn. He contends that the giving of the other tests, the pseudo isochromatic plate test, the Ishihara plate test, the Hardy Rand Rittler plate test and the Williams lantern tests, constituted a new and different type of test and as such was a change of the rules and constituted a wrongful discharge. Yet the record shows that plaintiff was given the Holmgren yarn test along with the other test. Plaintiff missed 10 of the 18 test plates of the pseudo-isochromatic

test, all of 12 Ishihara test plates, 11 of 14 Hardy Rand Rittler test plates, 9 of 68 lights in the Williams lantern test; and 7 out of 20 of the Holmgren Worsted yarns. If plaintiff had been given only the Holmgren yarns test he still would have failed.

Plaintiff put into the record defects of color perception of other engingers and firemen in support of his claim of discrimination. The nature and extent of the defects in color perception of these men is not shown and this court cannot say whether the same extent of defect of color perception existed with them as was shown to exist in the plaintiff. Apparently the railroad company officials and surgeons believed these men could continue to work and upon re-examination or recommendation of the superintendent they were permitted to work. Nevertheless, their working or not working does not change the fact that by the tests given him, plaintiff failed and was disqualified for service because of a color perception defect, sufficiently defective that the railroad surgeons and officials determined he could no longer perform the duties of fireman or engineer.

On the basis of this record, it seems evident that the plaintiff was not wrongfully discharged but was disqualified in accordance with company rules.

Even if the question of wrongful discharge was inconclusive, or the plaintiff was wrongfully discharged, the question whether he should have exhausted his administrative remedies before instituting the present suit remains to be determined. As we have said, there was no grievance presented, either to the union or to the Railroad Adjustment Board. The plaintiff asked for reconsideration of his disqualification, which was denied, refused to take a field test, took his pension and later entered suit.

Plaintiff relies upon *Moore v. Illinois Central Railroad Company*, 312 U.S. 630, in support of his contention that

he need not exhaust his administrative remedies before bringing suit. That case held that there was nothing in the Railway Labor Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge, or to make an administrative finding a prerequisite to filing a suit in court. That case further held that a plaintiff was not required by the Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to suit for a wrongful discharge. The Moore case originated in the State of Mississippi. The case of *Slocum v. Delaware L. & W. R. Co.*, 339 U. S. 239, sustains the *Moore v. Illinois Central Railroad Company* case, and holds that the Railway Labor Act does not bar courts from adjudicating wrongful discharge cases. However, in other cases, the doctrine of the *Moore v. Illinois Central Railroad Company* case has been distinguished to apply only if the state of origin does not require the exhaustion of administrative remedies as a prerequisite to suit. The case of *Transcontinental and Western Air, Inc. v. Koppal*, 345 U. S. 653, says that an employee is not precluded by Railway Labor Act from resorting to a state recognized cause of action for wrongful discharge, but that, in such action he must show exhaustion of his administrative remedies under his contract provided the applicable state law so requires. This is true, even though employer is carrier subject to the Railway Labor Act. The employee in that case was charged with abuse of his sick-leave privileges. A hearing was had on the charges and the employee attended the hearing, and upon the hearing officer ordering him to be discharged, he resigned "under protest". He took no appeal, but brought suit, and the court held he must first exhaust his administrative remedies.

The case of *Anson v. Hiram Walker & Sons*, 222 F. 2d 100, takes note of the doctrine of the Moore case, but says: "Where the applicable law permits his recovery

of damages without showing his prior exhaustion of his administrative remedies, he may so recover, as he did in the Moore litigation, supra, under Mississippi law. On the other hand, if the applicable local law, as in Missouri, requires an employee to exhaust his administrative remedies under his employment contract in order to sustain his cause of action, he must show that he has done so." (Citing *Transcontinental & Western Air, Inc. v. Koppal*, 345 U.S. 653.) And the court, continuing, said: "In Illinois it is well settled that where a member of a union or other association brings suit and if appears that his remedies are governed by laws and regulations of the association to which he belongs, he must, before he can succeed, show that he has exhausted all of the remedies provided by those laws and regulations."

There are a number of Illinois cases that state the rule in Illinois, but two recent cases have re affirmed the rule as stated by Judge Lindley in the *Anson v. Hiram Walker & Sons* case. *Payne v. Pullman Co.*, 13 Ill. App. 2d 105; *McMahaman v. Elgin, J. & E. Ry. Co.*, 25 Ill. App. 2d 449.

The recent case of *Handley v. Illinois Central Railroad Company*, 272 F. 2d 752, involved a suit for wrongful discharge, amended to wrongful removal from service. The plaintiff was a telephone operator on the switchboard of the railroad at Fulton, Kentucky. By reason of technological improvements the switchboard at Fulton was discontinued. Plaintiff, with others, was furloughed but offered a position at other points of the railroad company, one nearby, at Paducah, Kentucky. Some of the other telephone operators took positions elsewhere, but plaintiff refused. However, she retained her pass on the railroad and carried her group insurance as a furloughed railroad employee. She was a member of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees. The court held that under

the collective bargaining or working agreement between the union and the railroad, the matter must be handled by negotiations and ultimately, in the process of adjustment, by the National Railway Adjustment Board, in accordance with the provisions of the Railway Labor Act. The suit was dismissed.

Here, the plaintiff was not discharged, but disqualified for service. Other than reporting his disqualification to his union, and requesting to be reinstated, he did nothing further to pursue his remedies under the administrative provisions of the contract between his union and the railroad company.

In view of the law in Illinois, as recognized by the Federal courts, it is clear that the plaintiff, must be barred from pursuing his remedy in any court until he has exhausted his remedy under the remedies supplied by the Railway Labor Act and the collective bargaining contracts made in pursuance thereof. The judgment will be affirmed.

Affirmed.

Roeth, P. J., and Carroll, J., concur.

FINAL JUDGMENT ENTERED JANUARY 22, 1962 BY THE SUPREME COURT OF ILLINOIS

. . . And now on this day the Court having duly considered the Petition for Leave to Appeal herein as well as the record and abstract, filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by it in this behalf expended, to be taxed, and that it have execution therefor.

CONSTITUTION OF THE UNITED STATES.

ARTICLE XIV.

"§ 1. * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

45 U. S. C., § 152:

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

45 U. S. C., § 156:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representative of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has

elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

Moore v. Illinois Central Railroad Company, 312 U. S. 630 at 633, 636, 61 S. Ct. 754, 85 L. Ed. 1089:

". . . we find nothing in the Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court. . . . It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578) had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a 'dispute shall be referred to the designated Adjustment Board by the parties,' or by either party . . .' This difference in language, substituting 'may' for 'shall' was not, we think, an indication of a change in policy, but was instead a clarification of the law's original purpose. For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based upon a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustments and mediation voluntary in its nature. (citing H. Rep. No. 328, 69th Cong., 1st Sess., p. 4). The District Court and the Circuit Court of Appeals properly decided that petitioner was not required by the Railway Labor Act to seek adjustment of his controversy by the Railway Labor Act as a prerequisite to suit for wrongful discharge."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 776

LAWRENCE J. LONG,
Plaintiff-Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,
a Corporation,
Defendant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

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LAWRENCE J. LONG,

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vs.

ILLINOIS CENTRAL RAILROAD COMPANY,
a Corporation,

Defendant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The respondent, Illinois Central Railroad Company, submits this brief in opposition to the petition for certiorari in the above cause.

JURISDICTION.

Petitioners' suit does not present a case within the jurisdiction of the federal courts for reasons hereafter more particularly set forth.

QUESTIONS PRESENTED

1. Can a railroad employee who admittedly fails to meet physical requirements force a state court to assume jurisdiction to hear complaints of exercise of leniency to certain other employees where the law of the state requires exhaustion of administrative remedies of grievances based on labor contracts entered into pursuant to the Railway Labor Act?

2. Where both parties move for summary judgment thereby representing that no genuine issue of fact is presented and the trial court, Appellate Court and Supreme Court conclude as a matter of law, as permitted by statute and decision law of the forum state, that an admittedly physically disqualified employee was properly held out of service, can the employee now contend that fact questions exist for jury determination?

STATEMENT OF CASE.

The facts are that plaintiff, Lawrence Long, a locomotive engineer, on May 4 or 5, 1954 was disqualified for such employment by the defendant because the defendant earlier in 1954 in its regular quadrennial examination of all of its engineers and firemen discovered the plaintiff to have a disqualifying physical defect, namely, *defective color perception*.

The defendant by its Division Superintendent notified the plaintiff, both verbally and by letter, of the results of the defendant's physical examinations.

The results of the examinations by the defendant's examining physicians and surgeons are so clear and positive that there would seem to be no opportunity or ground for a reasonable dispute with respect to the facts as to whether or not the plaintiff was color blind, or had defective color perception.

It is undisputed that by the affidavit of one of the defendant's physicians and surgeons, Doctor William Murray of the Illinois Central Hospital located at 5800 Stony Island, Chicago, Illinois (Abst. 33, 34), the results of the examination of the plaintiff were as follows:

In the American Optical plate test consisting of 18 test plates and one demonstration plate, the plaintiff missed 10 of the 18 test plates;

In the Ishihara plate test consisting of 12 test plates and one demonstration plate, the plaintiff missed all 12 of the test plates;

In the HRR plate test consisting of 14 test plates plus three demonstration plates, the plaintiff missed 11 of the test plates;

In the Williams Lantern test consisting of 17 dif.

ferent lights in sets of three or 51 lights and an additional 17 lights which were examined through a small aperture, plaintiff missed 9 of the total 68 lights; and

In the Skeins test consisting of 20 skeins, plaintiff made 7 errors in selection of the skeins.

Doctor W. R. Marvel, the defendant's local physician at Clinton, Illinois, who made the initial examination of the plaintiff on February 27, 1954, found that the plaintiff was color blind and accordingly, thereafter, the plaintiff was re-examined at the hospital in Chicago on April 15, 1954 by Doctor Murray as above indicated.

The results of these tests set forth in the supporting affidavits to the defendant's motion for summary judgment are not disputed by the plaintiff. Plaintiff admits that he had previously discovered while he was in the army, he had defective color perception, but maintains his defect was a "slight congenital defect."

The affidavit of John F. Jackson, defendant's Ass't. Manager of Personnel (Addl. Abst. 14-15) states plaintiff had not been discharged as an employee, that he still receives the privileges as an employee and is being carried on the seniority roster.

The defendant's motion for summary judgment against the plaintiff and the plaintiff's motion for summary judgment against the defendant, the discovery depositions, the supporting affidavits and other documentary evidence attached to and submitted with the respective motions set forth a set of facts which is undisputed. In this posture the trial court decided there was no genuine issue as to any material fact between the plaintiff and the defendant as to the claim set forth in the plaintiff's amended complaint. The trial court denied the plaintiff's motion for summary judgment, sustained the defendant's motion for summary judgment and entered judgment in favor of the

defendant on the plaintiff's amended complaint in bar of action and for costs.

The defendant's motion for summary judgment (Abst 19-33) is supported by affidavits of Doctor William Murray, Doctor Ernest Olsen, Mr. E. H. Hallfoann, Director of Personnel for the defendant, and also a photostatic copy of Doctor Olsen's formal report attached as Exhibit A to Doctor Olsen's affidavit, which among other things found

> "Re-examination revealed he has defective color perception.
>
> "According to the standards specified in Operating Department Circular No. 18, he is disqualified.
>
> "In addition he also has defective vision but it will not be necessary to take this into consideration at this time, until *the* disqualifying defect is disposed of." (Italics supplied.)

The plaintiff in Paragraphs 12 and 13 of his amended complaint (Abst. 5, 6) quoted certain provisions of the contracts which he alleges to have been violated, and pursuant to which he instituted this action for damages.

The respective articles in those contracts have to do with *grievances and disciplinary matters*. There was no grievance or disciplinary charge made against the plaintiff by the defendant. The defendant has never made such a charge and the plaintiff in his discovery deposition and in his affidavits attached to his cross-motion for summary judgment against the defendant does not state any allegation, charge or fact that the defendant had discharged the plaintiff because of any disciplinary matter or grievance.

The plaintiff was advised as to the defendant's rules and regulations pertaining to his disqualifying defect and that he would be given a field test within five days after his request to his Division Superintendent for one. The plaintiff takes the flat position that he could not be required to take the defendant's field test which it had set up in ample

detail for the testing of vision and color perception of its locomotive engineers and firemen (Circular 18B, Addl. Abst. 25-33). The plaintiff resorts to scandalous and wholly unfounded charges that the field test would not have been given and administered fairly and honestly. Instead of requesting and taking the field test the plaintiff by his own admission within two or three days after receiving the Superintendent's letter of May 7 applied for his pension with the Railroad Retirement Board, urging in support thereof his physical defect which disqualified him from active service or employment by the defendant as a locomotive engineer, namely, defective color perception.

Illinois Central Railroad Operating Department Circular No. 18 is a management circular, copy of which is attached to the defendant's motion for summary judgment as Ex. 1 (Abst. 36). It sets forth the regulations and requirements governing physical examinations for employees, including Rule 10 outlining procedure upon examination disclosing defective color perception. There are no labor agreements that conflict with the provisions of said Circular 18 (Addl. Abst. 7). Circular 18B (Addl. Abst. 25) sets forth the regulations governing the conducting of field tests.

Dr. Murray testified on discovery deposition taken by the plaintiff that the plaintiff failed to pass, not only the Holmgren Worsteds tests, and the lantern tests, but all modifications of said tests. The defendant's answer to Interrogatory 22 propounded by the plaintiff states "That plaintiff's disqualification was based on the skeins tests, the lantern tests, the HRR plate test, the Ishihara plate test, and the American Optical plate test, all of which he failed to pass" (Abst. 52).

Plaintiff to date has refused to request a field test. He still holds seniority both as a locomotive engineer and as a locomotive fireman.

It is respectfully submitted that there is not a single material disputed fact in the record. The only real material issue in this case is did or did not the plaintiff have defective color perception. The answer in the record is an overwhelming Yes.

REASONS FOR DENYING WRIT.

I.

THE JUDGMENT OF THE TRIAL COURT AND THE OPINION OF THE APPELLATE COURT ARE BASED UPON ADEQUATE NON-FEDERAL GROUNDS.

(a) It Is the Law of Illinois that Entry of a Judgment Is Proper Where All the Material Facts Are Before the Court, the Issues Are Defined, Only a Question of Law Is Involved and Each Party Files a Motion for Summary Judgment.

This proposition is definitely settled by statute.—Sec. 57, Chap. 110, Illinois Revised Statutes, 1961, and the decision of the Illinois Supreme Court construing said section in *Allen v. Meyer*, 14 Ill. 2d 284; 152 N. E. 2d 576.

The judgment order entered by the trial court February 23, 1960 is as follows:

> "Now come the parties hereto, by their Attorneys, and the Court having heard the arguments and having examined all of the records, motions, depositions, affidavits, exhibits and files in this cause and being now fully advised thereon, overrules the motion of the plaintiff to strike portions of the answer of the defendant; and also the motion of the plaintiff for summary judgment against the defendant is denied; and the motion of the defendant for summary judgment against the plaintiff is allowed by the Court, and it is thereupon ordered by the Court that a summary judgment be and the same hereby is entered herein as prayed in the motion of the defendant, in favor of the defendant, Illinois Central Railroad Company, a corporation, and against the plaintiff, Lawrence J. Long, upon the amended complaint of the plaintiff, and the answer of the defendant thereto. * * *" (Abst. 125).

It will be noted that in reaching his decision the Court heard the arguments and considered all of the records, motions, depositions, affidavits, exhibits and files in the cause; that included among the motions was the motion of plaintiff for a summary judgment (Abst. 54-109) and the motion of defendant for summary judgment (Abst. 19-50).

This state of the record is almost exactly the same as the record before the Court in *Allen v. Meyer*, 14 Ill. 2d 284. There, too, the parties to the litigation filed their respective motions for summary judgment. On consideration of the respective motions the Court denied the defendant's motion and granted the plaintiff's motion. Affirming the Court's action and commenting on the procedure the Court said, page 291:

> "Before proceeding further, we should like to comment that the trial court's procedural handling of this case was correct beyond technical argument."

And continuing at page 292:

> "The Statute has since been amended to provide for the entry of summary judgment or decree in any proper case (Ill. Rev. Stat. 1957, chap. 110, par. 57). We regard this as a salutory development. Summary judgment procedure is an important tool in the administration of justice. Its use in a proper case, wherein is presented no genuine issue as to any material fact, is to be encouraged. The benefits of summary judgment in a proper case inure not only to the litigants, in the saving of time and expenses, but to the community in avoiding congestion of trial calendars and the expenses of unnecessary trials.
>
> "In the instant case both parties moved for summary judgment and thereby the court was invited to decide the issues by reference to its file. It is clear that all material facts were before the court; the issues were defined; and the parties were agreed that only a question of law was involved. In this view the parties were correct and the entry of summary decree for one

or the other was proper. *Reconstruction Finance Corp. v. Lucius*, 320 Ill. App. 57.

"The court properly treated each party's motion as being not only an application for summary decree, but a reply to the motion of his adversary. This was the proper interpretation under the circumstances. 'On the facts of this case, the affidavits of each party were presented not only in support of his own motion, but as a counter-affidavit opposing the motion of his adversary. Each party thereby admitted the sufficiency of his opponent's motion and supporting affidavit. *Grant v. Reilly*, 346 Ill. App. 399.'"

The filing by plaintiff of a motion for summary judgment is perforce a representation to the Court that there is no question of fact for a jury to pass upon. Plaintiff has had a trial with due process of law established under the public policy of the State of Illinois as indicated by its Constitution, statutes and judicial decisions.

(b) The Law of Illinois, as Recognized by the Federal Courts, Is That Plaintiff Is Barred from Pursuing His Remedy in Court Until He Has Exhausted His Administrative Remedies Under the Collective Bargaining Contracts of His Crafts Made in Pursuance of the Railway Labor Act.

Except for the negotiated agreements of the engineers, Ex. 2 (Abst. 37) and the firemen, Ex. 3 (Abst. 37) referred to in the plaintiff's amended complaint, there would be no basis for plaintiff's suit as defendant could have discharged him at will with or without cause. *Payne v. Pullman Co.*, 13 Ill. App. 2d 105, 118; 141 N. E. 2d 83. It is admitted that plaintiff failed to timely pursue the appeal steps outlined in Exs. 2 and 3 to finality. Because of the exclusive character of jurisdiction which has been vested in the National Railroad Adjustment Board under the Railway Labor Act, it is essential that any controversy must be proc-

essed to a complete termination. In *Pennsylvania Railroad Co. v. Day*, 360 U. S. 548, at 552 it is said:

> "Since the Board has jurisdiction, it must have exclusive primary jurisdiction. All the considerations of legislative meaning and policy which have compelled the conclusion that an active employee must submit his claims to the Board, and may not resort to the courts in the first instance, are the same when the employee has retired and seeks compensation for work performed while he remained on active service. A contrary conclusion would create a not insubstantial class of preferred claimants."

In *Transcontinental and Western Air, Inc. v. Koppal*, 345 U. S. 653, it is held that a discharged employee subject to the Railway Labor Act might bring an action in a state court for wrongful discharge *but in such action he must show exhaustion of his administrative remedies under his contract of employment provided the applicable state law so requires.*

That Illinois requires exhaustion of administrative remedies in order for plaintiff to sustain his alleged cause of action is clearly held in *Payne v. Pullman Co.*, 13 Ill. App. 2d 105; *McManaman v. Elgin Joliet & Eastern Railway Co.*, 25 Ill. App. 2d 449; *Anson v. Hiram Walker & Sons*, 222 F. 2d 100 (CA 7) and the Appellate Court in this case, *Lawrence J. Long v. Illinois Central Railroad Co.*, 32 Ill. App. 2d 103, appeal denied by the Illinois Supreme Court January 22, 1962.

In *Payne v. Pullman Co.* the plaintiff had been discharged for making advances toward a woman passenger. After stating at page 109:

> "The question of the right of an aggrieved railroad employee upon discharge to resort to the state courts for relief by way of damages for breach of contract has been the subject of litigation for some years, and three cases have quite definitely established the law.

Moore v. Illinois Central R. Co., 312 U. S. 630, 634; *Slocum v. Delaware L. & W. R. Co.*, 339 U. S. 239; *Transcontinental and Western Air, Inc. v. Koppal*, 345 U. S. 653, 654, 661."

the court stated at page 111:

"We must apply Illinois law to those questions."

and affirmed the Circuit Court's action dismissing the plaintiff's suit for failure to exhaust the remedies under the collective bargaining agreement of his union and the Railway Labor Act. This doctrine of exhaustion of remedies is well established under the law of Illinois. Under this court's holding in *Transcontinental and Western Air, Inc. v. Koppal*, it represents an adequate non-federal ground to support the judgment in this case.

II.

THE REQUIREMENT AS TO NOTICE AND HEARING IN SECTION 156 OF THE RAILWAY LABOR ACT APPLICABLE TO CHANGES IN COLLECTIVE BARGAINING AGREEMENTS NEGOTIATED PURSUANT TO SECTION 152 DOES NOT APPLY TO PHYSICAL STANDARDS SPECIFIED IN CIRCULAR 18 AND THERE ARE NO NEGOTIATED LABOR AGREEMENTS WHICH CONFLICT WITH THE PROVISIONS OF CIRCULAR 18.

Petitioner complains about the use of color perception tests other than the "woolen yarn" also known as Holmgren Worsteds tests stating that his color perception is the same right now as it has been from the date of his birth. He alleges that from 1923 up to January 1, 1954 Holmgren Worsteds was the only type of test administered to him or any other employee. That he always passed these tests satisfactorily. That all during this period of time, the color perception test administered to such employees was one contained in Circular No. 18 which reads as follows:

"The tests for color perception shall be made by the

Holmgren Worsteds or any standard modification thereof, and also by one of the several lanterns designated for this purpose" (Abst. 37).

At page 9 of his petition, citing Sections 152 and 156 of 45, U. S. C., the Railway Labor Act, he contends that Circular No. 18 could not be changed without notices and hearings provided by statute. This contention overlooks the uncontradicted showing in the record that said Operating Circular No. 18 is not a negotiated agreement embodied in the collective bargaining agreements contemplated by Section 152 (7th) or Section 156 but "is a management circular and there are no labor agreements that conflict with the provisions of the Circular." (Deposition of Hallmann, Add. Abst., Page 7.)

(a) As Plaintiff Was Unable to Pass the Holmgren Worsteds Skeins Test in 1954 His Claim Based on the Alleged Wrongful Additional Color Test Inaugurated in 1954 Falls of Its Own Weight.

It is significant that plaintiff ignores the requirement of Circular 18 that employees are required to pass the medical tests every four years.

Plaintiff's contention that he had passed satisfactorily ten former tests by use of Holmgren Worsted yarns ignores the uncontradicted fact that he did fail to pass that test at the regular quadrennial examinations in 1954. His contention necessarily means nothing if in fact plaintiff at the time of his disqualification could not pass the Holmgren Worsteds tests. The undisputed fact in this record is that on his examination on April 15, 1954, his color perception was in fact tested by the Holmgren Worsted yarns as well as by the lantern test which was also and for many years had been specifically named as proper in Circular 18. In the lantern test plaintiff missed 9 of 68 lights; in the

skeins (Holmgren Worsteds) test consisting of 20 skeins the plaintiff made 7 errors in selection of skeins. In answer to Interrogatory 22 propounded to the respondent by the petitioner it was stated, "Plaintiff's disqualification was based on the skeins test, the lantern test, the HRR plate test, the Ishihara plate test, and the American Optical plate test, all of which he failed to pass" (Abst. 52).

As the record clearly shows he was unable to pass the skeins test in 1954, at the time of his disqualification, his case, bottomed as it is on the alleged wrongful additional color test inaugurated in 1954, has fallen of its own weight.

III.

THE CONCLUSION OF THE APPELLATE COURT THAT PLAINTIFF WAS NOT DISCHARGED BUT DISQUALIFIED FOR SERVICE COINCIDES WITH THE RATHER UNIFORM INTERPRETATION APPLICABLE TO THE FACTS OF THIS CASE IN AWARDS OF THE FIRST DIVISION OF THE NATIONAL RAILROAD ADJUSTMENT BOARD.

The Appellate Court in its opinion reported in 32 Ill. App. 2d 103 at page 110 it specifically found: "Here, the plaintiff was not discharged, but disqualified for service." This conclusion is consistent with the decisions in *McManaman* v. *Elgin, Joliet & Eastern Railway Co.*, 25 Ill. App. 2d 449, 167 N. E. 2d 448 and *Handley* v. *Illinois Central R. Co.*, 272 F. 2d 752 (CA 6). It is also consistent with the uniform interpretation of the First Division of the National Railroad Adjustment Board which is the division which decides disputes of those in plaintiff's craft of employment and interprets the bargaining agreements of that craft.

Obviously the requirements for good eyesight and color perception are much more stringent for members of the crafts involved in the First Division covering employees actually operating trains than in the remaining three di-

visions. As will be noted from the balance of Section 153(h) of 45 U. S. C., the Second Division involves machinists, boilermakers, etc.; the Third Division, station, tower, telegraph employees, etc., and the Fourth Division, employees of carriers directly or indirectly engaged in transportation of passengers or property by water, etc., and all other employees of carriers over which jurisdiction is not given to the First, Second and Third Divisions.

The First Division has decided on numerous occasions whether an employee has been discharged within the meaning of the collective bargaining agreement and the right and duty of a carrier to prescribe physical qualifications of its employees. The following are a few of those decisions holding that an employee held out of service because he does not meet physical standards has not thereby been dismissed or disciplined.

Brotherhood of Railroad Trainmen, Illinois Central Railroad Company, National Railroad Adjustment Board First Division, Award 16468, Docket 29272, 1953:

> "This division recognizes the right of the carrier to establish certain physical standards that all employes must meet. This is a just and proper rule, since the carrier is charged with the safety of the public, its employes, and its property."

Brotherhood of Locomotive Engineers, Southern Railway Company, National Railroad Adjustment Board First Division, Award 12730, Docket 23477, 1949:

> "The carrier was fully justified in not returning this man to duty until it appeared that he could perform his work with due regard for the safety of the travelling public. In such a case as this where there is reasonable doubt as to the condition of the eyes of an engineer it must be remembered that the safety of the public is paramount."

Brotherhood of Railroad Trainmen, Erie Railroad Company, National Railroad Adjustment Board—First Division, Award 13632, Docket 23390, 1950:

> "The union argued that an employee who was removed from service because of inability to meet physical standards had been, in effect, disciplined without being afforded a hearing as provided for in the discipline rule. The Division rejected this contention by saying, 'This is not a discipline case and the discipline rules with reference to reinstatement with pay for time lost are inapplicable.'"

Brotherhood of Railroad Trainmen, The New York Central Railroad Company—Buffalo and East, National Railroad Adjustment Board—First Division, Award 14218, Docket 23644, 1951:

> "Because of an accident, the claimant was unable to meet the physical standards established by the carrier. He was not allowed to work. The union contended that he had been dismissed in violation of the discipline and investigation rule. The Division rejected this contention saying, 'The discipline or investigation rule has no application to the facts of record in this docket, despite employes' contention to the contrary.'"

Switchmen's Union of North America, Southern Pacific Company (Pacific), National Railroad Adjustment Board—First Division, Award 16819, Docket 31663, 1954:

> "The claimant, after successfully contending that he had been permanently disabled, asked to be returned to service. The carrier said that he could not meet physical standards. The union argued that the claimant had been discharged in violation of the discipline rule. The Division denied the claim saying, in part: 'The rules with reference to discharges do not apply. Claimant has not been discharged or subjected to discipline but has been adjudicated to be no longer fit for duty.'"

Brotherhood of Railroad Trainmen, Lehigh Valley Railroad Company, National Railroad Adjustment Board First Division, Award 17154, Docket 32760, 1955:

> "The claimant was not allowed to work because he could not meet physical standards established by the carrier. The union contended that the claimant had been dismissed in violation of the discipline rule. This contention was rejected. The Division held, in part: 'Claimant has not been dismissed, as asserted in his claim. He is still carried on the seniority roster and is kept out of service because of physical disability.'"

Brotherhood of Railroad Trainmen, New York, Chicago and St. Louis Railroad Company, National Railroad Adjustment Board—First Division, Award 17156, Docket 32825, 1955:

> "The claimant was not allowed to work after it was discovered that he did not meet physical standards established by the carrier. His union argued that he was 'disciplined or dismissed without fair hearing' in violation of a rule in the collective bargaining contract. The Division rejected this contention holding: 'Claimant was not dismissed, nor was his application rejected. Therefore, those rules were not violated. He was disqualified because of his physical condition and there is no denial of his disability as reported by the general surgeon or of its being sufficient to disqualify him.'"

IV.

MOORE v. ICRR CO. AND OTHER CASES CITED BY PETITIONER DISTINGUISHED.

Based upon the theory that he is suing for damages for wrongful discharge plaintiff necessarily relies (Petn. 6) on *Moore* v. *ICRR Co.*, 312 U. S. 630; 61 S. Ct. 754; 85 L. Ed. 1089 (Brief 31, 37 *et seq.*).

We submit the *Moore* case does not give plaintiff the comfort he needs. In the first place, plaintiff is not dis-

charged. He still retains his seniority with the defendant as a locomotive engineer and as a locomotive fireman. He has not treated his employment at an end but has sought (in spite of his refusal to date to ask to be given a field test) to maintain his employee relationship throughout the dispute. *Moore*, of course, had no seniority at the time he filed suit. He had accepted his discharge as final. But the plaintiff here, even since the filing of the amended complaint, is still seeking "to be restored to duty" and restored to "the wages he has lost." Absent the employer-employee relationship he possesses no seniority. See Paragraph 6 of plaintiff's cross-motion for summary judgment (Abst. 54).

Both the question of restoration to duty and the question of wages he has lost are within the peculiar and exclusive jurisdiction of the National Railroad Adjustment Board. The difference between the situations as to employment relationship between the plaintiff here and *Moore* are substantial and constitute an insurmountable barrier to the application of the *Moore* case.

But another and even more formidable barrier to the application of the *Moore* case is the later U. S. Supreme Court case of *Transcontinental and Western Air, Inc. v. Koppal* (1952), 345 U. S. 653. That case removed the *Moore* case as an authority for a suit for wrongful discharge of a railroad employee in the State of Illinois by holding that the exhaustion of administrative remedies must be shown prior to a suit in court for wrongful discharge if the forum state requires such exhaustion.

The case of *Brotherhood of Railroad Trainmen v. Howard*, 343 U. S. 768, also referred to by plaintiff (Petn. 6) is not relevant here. This was a class action involving, as stated in the opinion by Mr. Justice Black at page 774, "the validity of the contract (bargaining agreement) not its meaning."

The case of *Del Bianco v. Pennsylvania Labor Relations Board*, 89 Atlantic (2d) 323, cited at p. 6 of plaintiff's petition and the other cases enumerated following it do not appear to govern the situation under the Railway Labor Act and the contracts here alleged to have been violated by the respondent.

CONCLUSION

In conclusion, we submit that no sufficient ground for certiorari has been presented. The petition should be denied.

Respectfully submitted,

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No 776

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

LAWRENCE J. LONG,
Petitioner,

v.

ILLINOIS CENTRAL RAILROAD COMPANY,
a Corporation,
Respondent.

PETITION FOR REHEARING.

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IN THE

SUPREME COURT OF THE UNITED STATES.

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a Corporation,
Respondent.

PETITION FOR REHEARING.

Now comes the petitioner, Lawrence J. Long, and, pursuant to Rule 58 (2), earnestly prays this Court for a reconsideration and rehearing of his Petition for Writ of Certiorari and says:

1. That at the time this Court had the said matter under advisement, its consideration was limited solely to the Petition for Writ of Certiorari and the Answer thereto.

2. That in the said Answer there were factual errors and misapprehensions as to Illinois law which well could have misled this Court as to the nature of the controversy and as to the nature of certain of the issues presented.

3. That said Answer was not received by counsel for petitioner, because of his absence from the jurisdiction, until April 20, but that a Reply was immediately prepared,

printed and transmitted to the Clerk by the printer upon April 23; that unfortunately this Court did not have that Reply with its corrections of matters in said Answer before it for its consideration when acting upon the Petition; that leave should be given to the Clerk to distribute such Reply briefs for the consideration of this Court.

4. That if the Illinois decision in this case is permitted to stand, it would destroy for all purposes a judicial remedy in wrongful discharge cases since an employer, by filing an affidavit and seeking summary judgment, could effectively eliminate a jury passing upon the credibility of those persons whose affidavits were so submitted.

DISCUSSION.

The errors contained in the Answer of the defendant railroad company are discussed at greater length in the Reply Brief heretofore submitted to this Court. Among other matters, it points out that the Jackson affidavit was no part of the pleadings and had, in fact, been waived by the defense; that Illinois law does not, as stated in such Answer, prohibit a jury from passing upon the credibility of a witness such as Dr. Murray *unless both sides agree upon the facts* which is not true here; and that the plaintiff did in the trial court, contrary to defense assertions, seek a remedy for wrongful discharge and seek actual and punitive damages therefor. It is our sincere belief that this Court, not having the benefit of the Reply Brief, has been misled by the assertions of the Answer into believing that no justiciable controversy was presented for its consideration.

PRAYER FOR RELIEF.

Wherefore, petitioner prays that this Court grant a rehearing upon the petition for writ of certiorari and direct the Clerk to distribute the Reply Briefs for this Court's

consideration; and that upon such further consideration this Court order a writ of certiorari to issue to the Appellate Court of Illinois and that such further proceedings may be had as justice may require.

Respectfully submitted,

LAWRENCE J. LONG, Petitioner, by

JOHN ALAN APPLEMAN,
Of Counsel.

JOHN ALAN APPLEMAN,
DWIGHT H. DOSS,
JO B. GARDNER,
Attorneys for Petitioner.

State of Illinois, } ss.
County of Champaign. }

Certificate of Counsel.

John Alan Appleman, being first on oath duly sworn, states that he is a licensed practicing attorney admitted to practice in this Court; that the foregoing petition is presented in good faith and not for delay; that the petition is restricted to the grounds above specified.

John Alan Appleman.

Subscribed and sworn to before me this 5th day of May, 1962.

Constance Allison,
Notary Public.

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REPLY BRIEF

In Support of Petition for Writ of Certiorari.

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ILLINOIS CENTRAL RAILROAD COMPANY,
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Respondent.

REPLY BRIEF

In Support of Petition for Writ of Certiorari.

I apologize for the delay in the filing of this Reply Brief. Apparently, the Brief of the Railroad Company was delivered during my absence in delivering some lectures to the College of Law at the University of West Virginia, so that it was April 20 when I first saw its Brief. Ordinarily, no reply would be necessary. However, in this case the Brief of the Railroad Company unfortunately contains some errors which could be misleading to this Court if not corrected.

Upon page 4, reference is made to an affidavit of one John F. Jackson, with reference being made to an Additional Abstract. We were not aware of the filing of any

such Additional Abstract in this Court, and none has been served upon us. However we have searched the record and find that an affidavit of this individual was attached to an early motion by the Railroad Company in the Circuit Court of Champaign County. That motion was argued and denied. Thereafter, the Railroad Company filed an Answer which appears in the Abstract, pages 110-122, and the Jackson affidavit was not refiled. Certain portions of this Answer the plaintiff moved to strike (Abst. 123, 124), and our Notice of Appeal preserved the error of the trial court in failing to strike the objectionable conclusions contained in such Answer.

The defendant railroad took no cross-appeal from the order of the trial court denying its motion to dismiss the action, which was supported by the Jackson affidavit. Under Illinois law, the filing of an answer after a motion has been denied waives any matters contained in the motion. Thus it was stated in W. T. Iverson & Co., Inc. v. Dunham Manufacturing Company, 18 Ill. App. 2d 404 at 425, 152 N. E. 2d 615:

> "• • • the original pleading ceases to be a part of the record, being in effect abandoned or withdrawn, with the result that the subsequent proceedings in the case are to be regarded as based upon the amended pleading, which will not be aided by anything in the prior pleadings." (Citing cases.)

To the same effect is Brandeis Machinery & Supply Co. v. C. A. McNeely General Contracting & Equipment Company, Inc., 18 Ill. App. 2d 396 at 399, 152 N. E. 2d 890, pointing out that such matters are "waived by pleading over".

The Railroad Company, citing Allen v. Meyer, 14 Ill. 2d 284, 152 N. E. 2d 576, argues that where both parties move for a summary judgment, such a judgment should be en-

tered in favor of one or the other. That case is careful to point out (14 Ill. 2d 284 at 292) that this result follows only: "wherein is presented no genuine issue as to any material fact * * *."

It is our feeling that a summary judgment, upon this record, probably could be entered for the plaintiff for the following reasons: Lawrence Long had passed satisfactorily every Holmgren Worsteds test given to him until 1954; in 1954 Dr. Marvel, of Clinton, disqualified him not on the basis of that type of test, but on the basis of an Ishihara test and sent him to Chicago; if the Ishihara test was not a proper test and the defendant Railroad Company had no right to change its method of testing except by compliance with the requirements of the Railway Labor Act, then the defendant had no right to disqualify Lawrence Long on the basis of such test nor to require him to take further examinations nor to require a field test; in all events, the defendant railroad would have no right to impose a condition of an arbitrary field test which was wholly under its supervision and control, and which it waived as to employees less qualified than the plaintiff here. Also, from a purely legal point of view, it is not necessary for an employee who has been wrongfully discharged first to exhaust the remedies of the Railroad Adjustment Board—indeed, such would be an election of remedies which would prevent him from seeking a judicial remedy.

If this Court agrees with our position as to the above matters, then a summary judgment in favor of the plaintiff could be rendered. The one place in which a factual question may have to be determined by a jury is this: Assuming that it becomes material as to whether Lawrence Long failed a Holmgren Worsteds test administered by Dr. Murray, then we contend, and have contended, that such involves a question of fact for the jury. The Rail-

road Company cannot take away from the jury the right to determine the credibility of any witness, by substituting an affidavit attached to a motion for the testimony of that person in open court. In this instance, as we have pointed out earlier, Dr. Murray was an employee of the defendant railroad; he was subject to its supervision and had a definite incentive to give a report favorable to its position; it was undisputed that a defect in color perception is congenital in nature which neither becomes better nor worse as one proceeds through life; Dr. Murray admitted that Lawrence Long had passed successfully over a period of his thirty years of employment nine of such tests and that each of them showed him to be qualified to carry on his work either as an engineer or as a fireman.

If a defendant could, by the simple procedure of filing a motion for summary judgment, and attaching the affidavit of witnesses whose testimony will not stand searching cross-examination or the scrutiny of a jury, deprive an employee of the opportunity of having a jury determine the accuracy of the testimony of such witness, then the judicial remedy has become a mockery. Our counter-affidavits show the weaknesses in the testimony of this witness, and indeed his entire deposition is attached to the original motion of the Railroad Company. Such deposition contains within it the substance for impeachment and discrediting of the Murray affidavit.

Upon page 7 of defendant's Brief, it states:

> "The only real material issue in this case is did or did not the plaintiff have defective color perception" and, we assume, it means a defect sufficiently substantial to render him incapable of performing his duties.

This has never been adjudicated by any legal or proper test. It is analogous, in a criminal case, to saying:

"The only question in this case is whether or not the defendant held up and robbed a national bank."

If the conviction had been obtained by the use of improper and illegal evidence, this Court would reverse a conviction with instructions to disregard the improper evidence and for the issue to be determined in accordance with legal procedures. The plaintiff in this case, as a railroad employee having over thirty years of service, is entitled to an equal protection of his property rights. Again, the determination of Long's ability to perform his duties must be made upon a fair and non-arbitrary basis; it must be according to legal tests which have been recognized between the employer and its employees over the decades of his employment, and upon which tests he was accepted for service and satisfactorily performed his duties, without a single error or omission. It cannot be upon the basis of tests suddenly changed by the unilateral action of the employer, so as to require the imposition of an arbitrary field test which it waived as to employees having poor work records, but which it had refused to waive in the instance of the plaintiff for the sole reason that it wanted to eliminate him as an employee, because of an adverse report which he made while aiding the Interstate Commerce Commission. It will be noted that in no place in this Brief does the Railroad Company deny the truth of this charge.

The principal contention of the defendant is that, under Illinois law, the plaintiff is barred from pursuing his remedy in court until he has exhausted his administrative remedies under the contract. But, at this point, the Railroad Company falls into complete confusion.

To what administrative remedies does the Railroad Company refer? Its discussion is completely ambiguous. The work contract does not make reference to any re-

quirement of proceeding before the Railroad Adjustment Board. In the Payne case, in 13 Ill. App. 2d 105, the express contract of the parties provided for a determination of disputes as follows: (1) appeal to the district representative; (2) appeal to the assistant to the vice-president; (3) appeal to the National Railroad Adjustment Board. In the Koppal case the contract likewise provided a procedure for appeal from a determination by a hearing officer. Our contract does not have any such requirement and does not spell out any remedies within the organization to be exhausted, although the depositions show clearly that Lawrence Long did appeal first to his district superintendent, then to the personnel supervisor, the vice-president, and the president—all without avail. And, under the decisions of this Court, as pointed out in Union Pacific Railroad Company v. Price, 360 U. S. 601, if Lawrence Long had submitted his controversy to the Railroad Adjustment Board, such would have been a binding election of remedies which would have prevented him from submitting his controversy to a court and jury.

Clearly, then, the defendant Railroad Company is in error in believing—as did the Appellate Court of Illinois—that the employee had a duty to seek a remedy first from the Railroad Adjustment Board. The only other administrative remedy to which it could possibly have reference would be the taking of a "field test". We say that Lawrence Long is not required to take a field test in this case because: (1) he was not disqualified by proper medical tests, when the defendant railroad changed from the Holmgren Worsteds test to the Ishihara test, without complying with the statutory provisions; (2) the test as set forth by the Railroad Company is not a fair one, when a one hundred per cent performance is required, the employee is not permitted to have a disinterested expert present, and it is wholly and exclusively within the control of the Railroad Company; (3) this is particularly true

when the field test was waived in the instance of all other employees, even those with imperfect records, and when the Railroad Company does not deny that its objective was to effectuate a malicious discharge of the plaintiff.

As this Court pointed out in Brotherhood of Railroad Trainmen v. Howard, 343 U. S. 768, the courts have a right to grant a judicial remedy to protect any worker or group of workers from discrimination practiced against them. We submit that, even though the Howard case involved the protection of colored workmen against discrimination in favor of white workmen, a capable and honorable employee such as Long is entitled to be free from discrimination practiced against him by the railroad. The employees in the Howard case were not discharged, but were in effect replaced by others so that they were unable to work, and this was held to be equivalent to a discharge.

The defendant Railroad Company has stated that in effect Long has not been discharged, and that the plaintiff himself has not regarded himself as having been discharged. We think this is inaccurate. Lawrence Long offered repeatedly to do anything which was reasonable even to surrendering his rights as a locomotive engineer and to work only as a fireman, if the Railroad Company insisted upon this. But, when the suit was filed, the plaintiff set forth the entire story in his Amended Complaint (Abst. 1-7) alleging that he: "* * * has been deprived of his income from the time of his wrongful disqualification to the present and will be so permanently deprived thereof."

The relief which he asks in his Complaint, and to which the defendant has filed an Answer, is based clearly upon the theory of wrongful discharge. It states:

> "Wherefore, the plaintiff, Lawrence J. Long, prays actual and punitive damages against the defendant,

> Illinois Central Railroad Company, a corporation, in the sum of Two Hundred Fifty Thousand Dollars ($250,000) and costs, and demands trial by jury." (Abst. 7)

With reference to the only other point, the Railroad Company insists that it had the right to change the tests at any time, without giving the notice required by the Railway Labor Act. The Railroad Company is not in a position to insist on the one hand that the various Rules contained contractual provisions binding upon the plaintiff which he was required to fulfil, and yet contend on the other hand that they were not "confractual" provisions at all. We believe it was the contemplation of the Railway Labor Act that the terms and conditions of the employment could not be changed without giving notice and having a hearing in which both management and labor would be represented.

The defendant cites certain decisions of the Railroad Adjustment Board. We do not feel any of those are relevant. There is no question but that any employer has a right to establish certain physical standards for the proper performance of duties by employees. But where it has established the standards, and continued them for decades, it may not suddenly change those standards to disqualify employees properly performing their duties, without a reasonable compliance with the law and without making an equitable and uniform application of those standards. The defendant scarcely can contend solemnly that it has only the interests of the traveling public in mind, or a regard for public safety, when its officers have admitted (Abst. 60-66) that they know that Lawrence Long can perform the duties of his employment, that he has done so with absolute safety for over three decades, that he has never missed a signal, that he had a perfect record, that the acuity of his vision had prevented a possible bad

accident just the year before he was discharged, and that the real reason for wanting to discharge him was that:

> "during the period of time the plaintiff was employed by the Interstate Commerce Commission, certain instances arose in which the plaintiff was required to report the defendant railroad company for rebating and other matters which caused a certain hostility to exist between the officials of the said Railroad Company and the plaintiff, as a result of which the defendant Railroad Company, through its employees and officers, determined wilfully and maliciously to disqualify the plaintiff from service . . ."

To permit the decision of the Illinois Court to stand would be, in effect, to nullify the Moore case. A railroad, simply by failing to use the word "discharge", could prevent a railroad employee from ever securing a judicial remedy. The decision from which an appeal is taken is a misconstruction of the federal law. The result is onerous and unfair. Lawrence Long is entitled to the protection of his property rights; indeed, they are guaranteed to him by the Constitution of the United States. He is entitled to be treated with the same fairness as other employees, and to stand upon the terms of the contract under which he was employed. If this Court agrees with us that the Railroad Company had no right to change these tests without compliance with law, then his discharge was wrongful; he cannot be required to take the arbitrary field test, in any events, which is not required of other employees. And he is entitled to have a jury pass upon the question of damages suffered by him by reason of such wrongful discharge—and, if a question of credibility is presented as to any witness, including Dr. Murray, this also should be determined by a jury.

CONCLUSION.

We respectfully submit that the defendant Railroad Company has not adequately answered the Petition for Writ of Certiorari, and we earnestly pray that such Petition be allowed.

Respectfully submitted,

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